UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

APL LOGISTICS WAREHOUSE
MANAGEMENT SERVICES, INC.

and

INTERNATIONAL CHEMICAL WORKERS
UNION COUNCIL LOCAL 692C/ UNITED
FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, CLC

Cases 9-CA-43431
9-CA-43719
9-CA-43858
9-CA-43876
9-CA-44009

*Naima R. Clark, Esq.* for the General Counsel.
*Andrew J. Martone, Esq.* (*Bobroff, Hesse, Lindmark & Martone*), of St. Louis, Missouri, for the Respondent.
*Randall Vehar, Esq.*, of Akron, Ohio, for the Charging Party.

DECISION AND ORDER APPROVING
FORMAL SETTLEMENT AGREEMENT

Statement of the Case

JOHN H. WEST, Administrative Law Judge. This case was tried in Louisville, Kentucky, on January 23, 24, and 25, and February 26, 27, and 28, 2008. The charges in Case Numbers 9-CA-43431, 9-CA-43719, 9-CA-43858, 9-CA-43876, and 9-CA-44009 were filed, respectively on January 29, July 19, September 11, September 18, and November 27, 2007, by International Chemical Workers Union Council Local 692C/United Food & Commercial Workers International Union, CLC (Union) against APL Logistics Warehouse Management Services, Inc. (Respondent). As here pertinent, the third consolidated complaint (hereinafter referred to as the complaint), which was issued on December 21, 2007, alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, (Act) (1) by failing and refusing to furnish the Union with information, namely (a) since about October 18, 2006, a list of all temporary employees employed by Respondent,[1] (b) since December 18, 2006, specified information regarding Respondent's Sexual Harassment Policy[2], (c) since July 16, 2007, copies of all worker compensation claims and settlements since September 2006, and (d) since August 1, 2007, information about Respondent's drug and alcohol policies and procedures[3], (2) by

[1] This request was reiterated by letters dated October 23 and November 15 and 30, 2006. Additionally, as noted below, it was reiterated by letter dated January 23, 2007.

[2] As here pertinent, this request specified any additions or amendments to the sexual harassment policy since January 7, 2004, the nature of each complaint to the "Employee Hot Line," what action the company took to investigate each complaint, the results of each investigation, and what action the company took against employees or management as a result of any investigation.

[3] The Union's August 1, 2007 letter or information request involves 18 numbered

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unreasonably delaying the providing to the Union information it sought by letter dated May 29, 2007 about the bargaining unit employees,[4] their pay and benefits, all industrial hygiene reports "on the plant," a copy of all specified regulatory citations involving health and safety issues at Respondent's "plant operation," and a copy of all attachments to the current labor agreement made between the Union and the Company in the form of letters of understanding, side agreements, etc., (3) by on about September 11, 2007 withdrawing recognition from the Union, and (4) by about October 1, 2007, unilaterally implementing for unit employees an across-the-board wage increase and a merit increase system without prior notice to or without affording the Union an opportunity to bargain with Respondent with respect to this conduct and in order to discourage membership in the Union. The complaint also alleges that Respondent violated Section 8(a)(1) and (3) of the Act by unilaterally implementing for unit employees an across-the-board wage increase and a merit increase system because the employees of Respondent formed, joined or assisted the Union and engaged in concerted activities and to discourage employee from engaging in these activities. The Respondent denies violating the Act as alleged.[5]

On January 27, 2008 Counsel for General Counsel moved to amend the complaint. Her motion was granted. The amendment includes a number of additional allegations to the

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paragraphs, some of which contain subparagraphs. Only some of the paragraphs are involved in this proceeding. As here pertinent, information is sought regarding (1) the relevant training of the two supervisors who were allegedly involved in an attempt to have two employees take a drug and alcohol test on August 1, 2007, (2) a list of all similarly trained supervisors, (3) whether an employee assistance program is available and a copy of the program (Originally the complaint included "7. If the employer has requested any employee to take a drug or alcohol test and that employee has declined or refused, please give the name of the employee, describe the circumstances under which the test was requested and the action taken." At transcript page 97 Counsel for General Counsel indicated that this information had been provided and she was withdrawing this allegation. The Charging Party did not object.) , (4) what the testing procedures involve and the supporting documentation, (5) research involving what drug levels impair an employee's ability to function on the job, (6) the procedures for insuring that "false positives" do not occur, (7) the name of the laboratory used, the terms of the agreement between Respondent and the lab, the lab's credentials, and whether the lab participates in any proficiency testing programs (8) methods for confirming positive results, especially where trace amounts may be from passive exposure, (9) if the Company suspects illegal use of drugs (as defined in the Company's Policy) on company property involving employees represented by the Union, state whom and the basis upon which the suspicions exist, and (10) all data correlating substance abuse and safety and/or accident statistics.

[4] The Union requested the name, address, telephone number, date of hire, classification, rate of pay, age, sex, and current employment status of the bargaining unit employees.

[5] Respondent asserts the following affirmative defenses: (1) the information requests are moot, (2) this matter should be deferred to grievance/arbitration, (3) the Union is precluded from requesting the information sought, (4) the involved allegations are barred by the doctrines of waiver, latches, estoppel, unclean hands, and the applicable statute of limitations, (5) Respondent withdrew recognition based on the Union's actual loss of majority status, and based on a good faith belief that the Union lost majority status, (6) the complaint fails to state any allegation upon which relief can be granted, (7) any changes to terms and conditions of employment were made at a time that the Union no longer had majority support of unit employees and/or were required by exigent circumstances which would justify unilateral action, and (8) all or parts of the Amended Complaint violate Respondent's rights to due process and equal protection of laws.

complaint and some modifications in existing paragraphs to include reference to the additions made by this amendment. See General Counsel's Exhibit 37. First, with respect to additional allegations, the complaint was amended to add a date when the Respondent was requested to provide the Union with a list of all temporary employees employed by Respondent. Second, a paragraph was added which alleges that since about January 23, 2007, the Union, by letter, requested that Respondent provide it with the positions and hours worked of all temporary employees. Third, a paragraph was added to allege that about September 11, 2007, Respondent unilaterally cancelled the paid time off (PTO) of bargaining unit employees for the period September 11 to 16, 2007. Fourth, a paragraph was added to allege that about September 12, 2007, Respondent unilaterally discontinued the deadline for scheduling PTO. Fifth, a paragraph was added to allege that sometime after September 13, 2007, Respondent unilaterally implemented a new PTO policy. Sixth, a paragraph was added to allege that sometime in September or October 2007, Respondent unilaterally increased the starting wage rate for new hires. Seventh, a paragraph was added to allege that Respondent engaged in the conduct described in the last four preceding sentences herein without prior notice to and without affording the Union an opportunity to bargain with Respondent with respect to this conduct. Respondent denies all of the additional allegations except that it admits that (1) since about January 23, 2007, the Union, by letter, requested that Respondent provide it with the positions and hours worked of all temporary employees, (2) about September 11, 2007, Respondent unilaterally cancelled the PTO of bargaining unit employees for the period September 11 to 16, 2007, and (3) in October 2007, Respondent unilaterally increased the starting wage rate for new hires.[6]

A. Background

On January 7, 2004, the International Chemical Workers Union Council was certified as the exclusive collective-bargaining representative of the following employees of Respondent, which employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time warehousing employees employed by [Respondent] at its Shepherdsville, Kentucky facility, but excluding all office clerical employees, all employees employed by the temporary agencies, all professional employees, administrative assistants, and guards and supervisors as defined in the Act, as set forth at NLRB Case 9-RC-17821

In its answer to the complaint herein Respondent admits that after certification was enforced by a U.S. Court of Appeals, Respondent recognized the Union as the collective-bargaining representative, and such recognition was embodied in a collective-bargaining agreement effective by its terms from September 11, 2006 to September 10, 2007.

The trial in this matter was continued on February 28, 2008 when Counsel for General Counsel and Respondent indicated that they had reached a verbal settlement but needed time to "hammer out" the terms of the settlement agreement and notice.[7] Also, the Charging Party

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[6] As an affirmative defense, Respondent asserts that the information request was sought for purposes of harassment and not for legitimate representational purposed.

[7] By Order dated February 27, 2008, Judge Thomas B. Russell of the United States District Court for the Western District of Kentucky, Louisville Division, in *Gary W. Muffley v. APL Logistics Management Warehouse Services, Inc.*, Case No. 3:08CV-26-R, granted the Petition for Injunction of the Regional Director of the Ninth Region of the National Labor Relations Board

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requested time to draft its Memorandum in Opposition to the settlement.

By Order issued March 3, 2008, the filing schedule was specified. Extensions were subsequently granted to Counsel for General Counsel and the Charging Party. Ultimately, Counsel for General Counsel was directed to file a motion seeking approval of a settlement agreement and notice by March 19, 2008, the Charging Party's motion in opposition was due by April 7, 2008, and Counsel for General Counsel's and the Respondent's responses to the Charging Party's motion in opposition were due April 21, 2008. It was also indicated that a Decision and Order on the above-described motion of Counsel for General Counsel would be subsequently issued. The Motion for Approval of Settlement Agreement was filed March 19, 2008, the Notice was filed March 25, 2008, the Charging Party's Memorandum in Opposition was filed on April 7, 2008,[8] and on April 21, 2008, Counsel for General Counsel and the Respondent filed their responses to the Charging Party's Motion in Opposition. On April 15, 2008 the Charging Party filed a Notice to correct its Memorandum in Opposition. On April 22, 2008, the Respondent filed a Motion and Memorandum in Support to Strike Portions of the Affidavit of Michael Elick which was submitted with the Charging Party's Memorandum in Opposition. On April 23, 2008, the Charging Party filed a Request for Leave to File a Reply Brief. On May 2, 2008 the Charging Party filed an Opposition pleading to Respondent's Motion to Strike Portions of Elick's affidavit. And on May 5, 2008 the Charging Party filed a Notice of Additional Objection to Counsel for the General Counsel's Motion for Approval of Settlement Agreement. On May 9, 2008, Respondnet filed a Motion to Supplement its Reply.

B. The Settlement Stipulation

In her Motion, Counsel for General Counsel submits that with the exception of certain allegations that Counsel for the General Counsel agreed to withdraw as a condition to reaching settlement, the terms of the settlement will effectively remedy all of the allegations of the Third Consolidated Complaint and amendments thereto in this matter. With respect to the allegations which will be withdrawn, Counsel for General Counsel asserts that General Counsel agreed to withdraw the allegations because, in the General Counsel's opinion, the record evidence established that the Union had received the requested information, notwithstanding any delay.[9]

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(Board) and enjoined APL Logistics Management Warehouse Services, Inc. from failing and refusing to recognize and bargain with International Chemical Workers Union Council, Local 692C/United Food and Commercial Workers International Union, AFL-CIO-CLC as the exclusive collective-bargaining representative of employees in the unit represented by the Union and from making unilateral changes in the wages and other terms and conditions.

[8] The Charging Party includes a Motion to Correct Caption, pointing out that the Union's parent labor organization, the United Food and Commercial Workers (UFCW) is not currently affiliated with the AFL-CIO, having disaffiliated from the AFL-CIO on July 29, 2005. See *Laurel Baye Healthcare of Lake Lanier, LLC*, 346 NLRB 159 (2005). The Charging Party indicates that as of this date the UFCW has not re-affiliated with the AFL-CIO. This unopposed motion is hereby granted.

[9] Pursuant to the terms of the stipulation, Counsel for General Counsel would withdraw the above-described allegation that Respondent unlawfully failed and refused to furnish the Union with requested information by unreasonably delaying the providing to the Union information it sought by letter dated May 29, 2007 about the bargaining unit employees, as described above. Also Counsel for General Counsel would withdraw the word "claims" from the allegation that Respondent failed and refused since July 16, 2007 to furnish the Union with copies of all worker compensation claims and settlements since September 2006 and the attendant allegation. Finally, she would withdraw "7. If the employer has requested any employee to take a drug or

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It is also pointed out that the Settlement provides for entry of a Board order remedying the conduct alleged in the complaint and Respondent's consent to enforcement of the Order in a United States Court of Appeals.

C. The Charging Party's Memorandum in Opposition

First, the Charging Party argues that since the proposed settlement is conditioned upon the General Counsel withdrawing certain allegations from the complaint, the withdrawal of such allegations must be approved by the Judge and later by the Board; and that since the proposed settlement does not include or remedy all of the allegations still included in the complaint - such as some of the allegations involving the January 23, 2007 letter seeking various categories of information about the temporary employees, as well as the allegations involving APL's unreasonable delay in providing the pension and other May 29, 2007 requested information - and it is opposed by the Union, there is a question as to whether the Judge, even if he wished to do so, is authorized to approve that settlement. See e.g. Section 9-420 of the NLRB Decision of Judges Bench Book and Section 10166.1 of the NLRB's Casehandling Manual (Part One).

Second, the Charging Party argues that the Judge should not approve the withdrawal of allegations regarding APL's unreasonable delay in providing information in response to the Union's May 29, 2007 letter or the failure to remedy all of the allegations regarding the temporary employee-requested information. Further the Charging Party argues that Counsel for General Counsel has not even made clear in her motion that the settlement does not fully address or remedy the newly-added allegations regarding the January 23, 2007 letter which broadened the information being requested about the temporary employees; that the proposed settlement would preclude this Judge from entering any factual-finding that the RD-Petition was tainted by the fact that APL failed to provide the Union with the temporary employee-related information and that this was discussed by the employees who signed the petition; and that given APL's previous informal settlement in Case Nos. 9-CA-40618 et al where it agreed to timely provide information, APL should not again escape an effective remedy for its continued failure to timely provide the information to the Union.

Third, the Charging Party argues that since the Union may, and intends to, seek broader or different remedies for violations of the Act than those sought by the General Counsel for the violations alleged in the complaint, the settlement should not be approved; that while the General Counsel, prior to the commencement of the hearing, may exercise prosecutorial discretion on what allegations to make regarding what portions of the Act may have been violated, the Board has the responsibility for fashioning an appropriate remedy; and that in *Kaumagraph Corp.*, 313 NLRB 624 (1994) the Board allowed that charging party to introduce evidence bearing on a particular remedy that the General Counsel was not seeking.

Fourth, the Charging Party argues that since the Union has a right and a basis to seek fees and expenses for litigating these matters for six (6) days in January and February, 2008 (as well as in the previous pre-trial summary judgment matters), the Union should be permitted to proceed with the hearing in an effort to seek such broader remedies; that when a respondent's

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alcohol test and that employee has declined or refused, please give the name of the employee, describe the circumstances under which the test was requested and the action taken" and "13. (A) If the Company suspects illegal use of drugs (as defined in the Company's Policy) on company property involving employees represented by the Union, state whom and the basis upon which the suspicions exist" and any attendant allegation regarding the August 1, 2007 drug and alcohol information request.

litigation position has been advanced in bad faith or when an employer's defense to an unfair labor practice allegation has been frivolous the Board can award litigation expenses, *675 West End Owners Corp.*, 345 NLRB 324, 326 (2005); that at least in one case, the Board has granted litigation expenses when the respondent's conduct was outrageous even though the employer's defenses were 'debatable,' "*J.P. Stevens & Co.*, 244 NLRB 407 (1979), enf'd and remanded, 668 F2d 767 (4th Cir. 1982), vacated and remanded, 458 U.S. 1118 (1982)"; that basically the only question remaining with respect to the APL's delay in providing information in response to the May 29, 2007 letter is whether the delay was legally unreasonable; that the Board has made clear that the request for information regarding temporary employees who perform, or allegedly perform, bargaining unit work involves presumptively relevant information, *Pavilion at Forrestal Nursing & Rehabilitation*, 346 NLRB No. 46 (2002); that once the complaint was amended to include the January 23, 2007 letter, which broadened the basis, as well as the breadth, of the information request regarding the temporary employees, APL no longer could rely on a 'no pending grievance' defense even as to questions of the affirmative remedy, since the January 23, 2007 request made clear that it was not tied to any specific grievance; that APL has not offered a good defense to its failure to timely respond to the Union's request regarding APL's sexual harassment policy and the application thereof; that surface or bad faith bargaining by APL is evidenced by APL's failure to not only provide the Union this sexual harassment information but to undermine the Union by how it responded on this matter by providing this information to employees and thereby directly dealing with the employees; that Respondent's defense that unstated matters alleged in the complaint should be deferred to arbitration appears to have been made in bad faith and was frivolous in that on September 11, 2007 Respondent withdrew recognition from the Union and Respondent took the position that nothing in the expired collective-bargaining agreement survived the recognition withdrawal; that Respondent raised the frivolous defense in its answer that the alleged unfair labor practices were untimely and that it had been denied due process and equal protection; and that whether the Union would be granted such remedies is not relevant as to whether the Union should be granted the right to pursue such remedies, *675 West End Owners, Corp.,* supra.

Fifth, the Charging Party argues that the Union may seek, as part of the remedy for the alleged violations, its expenses in bargaining; that the Board has held that when an employer has made negotiations a 'fruitless waste of time' the employer may be ordered to reimburse employee-members of the Union negotiation committee for wages lost because of attendance at past negotiating meetings, *M.F.A. Milling Co.*, 170 NLRB 1079 (1968) enf'd, 463 F.2d 322 (D.C. Cir. 1972) as well as requiring an employer to reimburse the union itself for bargaining expenses where the 'economic resources wasted by the union in the futile pursuit of a collective-bargaining agreement are a direct and proximate result of [the employer's] willful defiance of its statutory obligation,' *Wellman Industries, Inc.*, 248 NLRB 325 (1980); and that whether the Union would be granted such remedies is not relevant as to whether the Union should be granted the right to pursue such remedies.

Sixth, the Charging Party argues that the proposed settlement does not adequately remedy APL's withdrawal of recognition and failure to bargain in that it does not address how long APL should be required to bargain in good faith before APL, again, may seek to withdraw recognition, or before the pending RD-Petition could be 'unblocked'; that the pending RD-Petition should be dismissed and not just blocked because it was 'tainted' by APL's prior unfair labor practices, including the failure to produce any temporary employee-related information, as well as APL's delay in providing the information in response to the May 29, 2007 letter - all of which occurred prior to the June 2007 signatures on the petition; and that once APL defended its withdrawal of recognition based on its review of this Petition as part of its affirmative defense to the related complaint allegations, the Union had a right to challenge that affirmative defense based on any appropriate theory regardless of whether the General Counsel was pursuing that

theory, *Cf., Mine Workers Local 1329 (Alpine Construction)*, 276 NLRB 415, n.1 (1985).

Seventh, the Charging Party argues that since the proposed formal settlement does not contain relevant factual findings about, address, or remedy the Section 8(a)(3) allegations, it should not be approved; that while the proposed formal settlement addresses the unilateral increases in wages as being a violation of Section 8(a)(5) of the Act, it does not remedy the 8(a)(3) discrimination aspect of these changes; that the formal settlement does not provide for an appropriate cease and desist order that would prevent future discriminatory wage decisions; that APL was discriminating against employees on across-the-board wage increases, as well as merit-based wage increases, depending upon whether sufficient employees were supporting or opposing the Union and on whether the increases would occur before or after recognition withdrawal; and that by approving the formal settlement, the Board will be precluded from providing any, let alone any novel, remedy for these discriminatory 8(a)(3) violations like ordering that all employees be granted the highest merit-based performance wage increase on his/her anniversary date, or that all employees should be immediately granted that merit or 'cost-of-living increase as APL had proposed to Dow.

Eighth, the Charging Party argues that since the proposed formal settlement contains either insufficient or inaccurate facts necessary to support enforcement of that settlement, it should not be approved. More specifically, the Charging Party submits that there are no facts set forth to establish either a 'tainting' of the RD Petition and, in turn, a tainting of the withdrawal of recognition; that there are no facts that undermine the legality of the withdrawal of recognition so as to support the necessary 'insulation period' or to support broader remedies, or 8(a)(3) remedies; that such facts should be set forth in the proposed settlement; that the Formal Settlement refers to the 'Maysville' facility in II,2 when it should refer to the 'Shepherdsville' Kentucky facility; that the Stipulation throughout erroneously refers to Local 692C as the certified bargaining agent when the certified bargaining agent is ICWUC, while Local 692 C and ICWUC, jointly, are the recognized exclusive bargaining agent; that Section IV(2)(e) should more clearly state that the Judge granted the motion to amend the Third Consolidated Complaint; that Section IV(2) should more clearly set forth which 'certain other allegations' of the Third Consolidated Complaint are being withdrawn, if any, in addition to those set forth in subsections (i) and (ii); and that Section IV(5) constitutes a non-admission clause but if the Stipulation is to take the place of an adjudicated record it should set forth not only that the Respondent's actions are 'alleged' to have violated the Act, but that the actions, in fact, violate the Act and/or that APL, by not filing a timely Answer, or by withdrawing its Answers, effectively has admitted to these violations.

Finally, under the topic heading "Other objections to the proposed formal settlement" the Charging Party submits that inexplicably in Section V(4)(b) the Stipulation has dropped references to Paragraph A(2) of the December 18, 2006 letter as well as in the related portion of Section VI(2)(iii); that in Section V(7)(h) and in related Section VI the proposed settlement inexplicably and without explanation by the General Counsel eliminated language alleging discrimination contained in the corresponding provision of the complaint and, thereby, fails, as required, to remedy or adequately resolve all violations; that Section VI(2)(a)(ii) does not require all of the information to be produced that was required in the January 23, 2007 letter as provided for in the complaint as amended; that any Notice should be sent to all former APL employees who were employed at any time during the period of APL's violations since former employees might be interested in returning to APL at the higher wages if APL's unlawful activity is remedied; that given APL's history, any remedial order should direct APL not to violate the Act 'in any manner,' not just in a like or related manner; that the signature on behalf of APL on the proposed settlement is illegible and the person's name and title should be typed in below their signature so that the employees and the Union know who is signing the Notice and

settlement for APL; and that the Union is concerned that, given its newly-filed charges, some of which involve evidence adduced in this hearing, such as the unilateral pension termination, approval of the settlement could risk prosecutorial problems under *Jefferson Chemical Company, Inc.*, 200 NLRB 992 (1972) and similar Board law.

The Charging Party filed a Notice of Correction, dated April 15, 2008, to its Memorandum in Opposition pointing out that contrary to the impression it may have left in its Memorandum in Opposition, the Respondent did provide the names of purported temporary employees.

D. Counsel for General Counsel's Reply to the Charging Party's Memorandum in Opposition

Counsel for General Counsel, in her response to the Charging Party's Memorandum in Opposition, acknowledges that she inadvertently failed to include any reference to the information requested in paragraph A(2) of the Union's December 18, 2006 request in the settlement, and Counsel for General Counsel indicates that she does not oppose other specified additional corrections proposed by the Charging Party.[10]

With respect to the Charging Party's claimed omission of certain complaint allegations from the Settlement, Counsel for General Counsel contends that the Charging Party's apparent claim that Counsel for General Counsel amended the complaint to allege that Respondent was legally obligated to provide all of the items requested in the January 23, 2007 letter regarding temporary employees is patently false, and the involved complaint allegations are fully addressed in the settlement Fact stipulation, and in the proposed Order and Notice; that contrary to the Charging Party's argument, the Settlement fully remedies the alleged discriminatory wage increases in that the parties stipulate that Respondent implemented the across-the-board wage increases and merit increase system to discourage employees from engaging in union and other concerted activities and the proposed Order requires Respondent to cease and desist from such conduct[11]; that with respect to the withdrawal of the allegation regarding Respondent's alleged delay in providing the information requested on May 29, 2007, Counsel for General Counsel agreed to seek, and sought, withdrawal of this allegation as a concession to reaching settlement; and that

[10] The additional corrections Counsel for General Counsel agrees to are (1) the Charging Party's Motion to Correct the Case Caption to reflect Charging Party's correct name, (2) a correction reflecting that the International Chemical Workers Union Council, and not UFCW Local 692-C, was certified by the Board as the collective-bargaining agent of unit employees, and (3) deleting from Section II (Jurisdiction), paragraph 2 the word "Maysville" and replacing it with "Shepherdsville" to reflect the correct location of Respondent's facility. Counsel for General Counsel's inadvertent failure to include any reference to the sexual harassment policy information requested in paragraph A(2) of the Union's December 18, 2006 request in the settlement is corrected in the attachment to her reply. Counsel for General Counsel points out that Respondent advised her that it consents to the revisions regarding paragraph A(2) of the Union's December 18, 2006 request, and Respondent will execute a new Settlement incorporating the changes if necessary. Additionally, Counsel for General Counsel points out that at the underlying trial herein evidence was presented that Respondent had not amended the sexual harassment policy since January 7, 2004; and that Respondent had previously provided a copy of the sexual harassment policy to the Charging Party.

[11] Counsel for General Counsel points out that while the language in the Settlement does not exactly mirror the language in the complaint, it proscribes the alleged Section 8(a)(3) misconduct with the same efficacy.

> Approval of the request to withdraw this allegation is entirely appropriate given the overarching policy of resolving unfair labor practices through settlement. In the context of the overall remedy that is being attained through the Settlement, this is a relatively minor concession. The Charging Party argues that withdrawal of this allegation is inappropriate because Respondent previously entered into an informal settlement agreement wherein it agreed to furnish information to it in a 'timely manner.' However, Respondent's alleged violation of this term is addressed by the fact that the current Settlement - which requires Respondent to cease and desist from refusing to provide necessary and relevant information to the Charging Party - is a formal stipulation, and provides for a Board Order enforceable by the United States Courts of Appeals. Consequently, it represents a stronger deterrent to any future failures or unlawful delays in providing information to which the Charging Party is legally entitled. [Counsel for General Counsel's Reply, page 6]

Counsel for General Counsel further replies that the question of whether the involved decertification petition was tainted by Respondent's delay in providing the information requested on May 29, 2007 is moot for the purpose of establishing an unlawful withdrawal of recognition because that allegation is being remedied by the Settlement[12]; that contrary to the argument of the Charging Party, Section 10166.1 of the Board's Casehandling Manual, Part I does not prohibit the Judge from approving the Settlement in that Counsel for General Counsel has taken appropriate procedural steps in seeking withdrawal of the complaint allegations that are not covered by the Settlement; and that the Charging Party is equally wrong in asserting that Section 9-420 of the Board's Bench Book prohibits the Judge from approving the Settlement over its objections in that (a) Section 9-420 sets forth the standards for approval of settlements by consent order, i.e., a settlement offered by the respondent and opposed by both the General Counsel and the charging party, and (b) the proposed Settlement is not a consent order.

With respect to the Charging Party's claimed right to seek broader remedies, Counsel for General Counsel replies that such claim does not outweigh the greater interests served by the Settlement; that the Charging Party's chances of obtaining reimbursement of litigation and collective-bargaining expenses are remote at best, and rejecting the Settlement and returning to trial for this purpose would constitute an irresponsible waste of time and resources given the fact that Respondent has executed a settlement agreeing to fully remedy the complaint allegations; that there is no allegation in the complaint that Respondent engaged in bad faith or surface contract negotiations, and, therefore, there are no grounds for granting such a remedy[13]; that in *Wellman Industries, Inc.*, 248 NLRB 325 (1980) it was indicated that the Board refrains from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in clearly aggravated misconduct or in the flagrant repetition of conduct previously found unlawful or where the defenses raised by the respondent are debatable rather than frivolous; that while Respondent's defenses herein are debatable, and insufficient as argued by the General Counsel at trial, they are clearly not frivolous[14]; and that in

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[12] Counsel for General Counsel points out that, contrary to the assertion of the Charging Party, the complaint does not allege that Respondent failed to fully comply with the May 29, 2007 request. Rather, according to Counsel for General Counsel, the complaint alleges and it is her position that Respondent complied with the May 29 request about August 6, 2007.

[13] Counsel for General Counsel acknowledges that the Charging Party has filed a charge alleging bad faith and surface bargaining during the 2007 negotiations in Case 9-CA-44210, which charge was being investigated by the Region at the time the Reply was filed.

[14] According to Counsel for General Counsel, Respondent generally claimed that it complied with the information requests, except information related to temporary employees, or that the

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*M.F.A. Milling Co.*, 170 NLRB 1079 (1968) the Board denied litigation expenses even though the employer persistently acted in bad faith throughout contract negotiations, refused to supply information to the union and eventually refused to meet with the union.

Regarding the Charging Party's argument that the Settlement should be rejected because it insufficiently remedies the withdrawal of recognition in that it (a) does not set forth a clearly-defined insulation period, and (b) it precludes the Charging Party from establishing that the anti-union petition was tainted, Counsel for General Counsel replies that the question of whether the anit-union petition was tainted and thus illegally relied upon by Respondent in withdrawing recognition is moot now that Respondent has executed a Settlement remedying the withdrawal; that the question of whether the petition should be dismissed based on a tainted showing of interest is not an issue to be decided in this proceeding, and if the Charging Party wished to have a ruling regarding whether the showing of interest is tainted, it may request that the Regional Director hold a hearing on this issue in processing the RD petition, *Saint Gobain Abrasives, Inc.* 342 NLRB 434 (2004); that with respect to the Charging Party's concern about an insulation period, it is well established that a Board Order remedying a refusal to recognize an incumbent union requires that the employer bargain in good faith, and that such obligation is understood to bar any challenge to the Union's majority status for a reasonable period, *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001); that the Board has defined a reasonable period as at least 6 months measured from the time that the employer commences bargaining in good faith, but no more than 1 year, Id., fn.6; and that the Board does not typically include this definition in the body of its order, it is inherent to the remedy and will be applied to any subsequent challenge to the Union's majority status, and the lack of a clearly defined insulation period in the Settlement is not fatal to its approval.

With respect to the Charging Party's objections based on the inclusion in the Settlement of (a) a non-admissions clause, and (b) a standard cease and desist order and not a broad cease and desist order, Counsel for General Counsel replies that inclusion of a non-admissions clause is not a valid basis for objection when the settlement otherwise effectuates the policies of the Act, *United Mine Workers of America*, 191 NLRB 209, 210 (1971); that the Charging Party has failed to substantiate its need for a broad cease and desist order as such orders are normally reserved for more egregious and widespread conduct or for a respondent who has been adjudicated as a repeat offender; and that while Respondent previously entered into an informal settlement agreement remedying prior alleged unfair labor practices, the prior matter was not the subject of adjudication, and any argument that Respondent somehow violated the prior informal settlement through the alleged misconduct herein is addressed by the fact that the General Counsel now seeks a formal settlement.

Regarding the Charging Party's argument that the unfair labor practice charges that it filed during the underlying trial in this matter raise issues under *Jefferson Chemical Co, Inc.*, 200 NLRB 992 (1972) and preclude approval of the proposed Settlement, Counsel for General Counsel replies that now faced with a Settlement to which it objects, the Charging Party is attempting to bootstrap its newly-filed unfair labor practice charges to the current complaint in order to block approval of the Settlement; that a cursory review of the new charges reveals that, with the exception of the alleged unilateral pension termination, most of the allegations involve conduct about which the Charging Party knew or reasonably should have known well before the trial commenced in this matter; and that if the Charging Party is now precluded from attaining a

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information did not exist; and that regarding withdrawal of recognition, Respondent claimed to have relied on a decertification petition that Respondent claims was signed by a majority of unit employees.

remedy for these allegations under *Jefferson Chemical Co.*, supra, it is due to its own failure to file charges.

E. Respondent's Reply to the Charging Party's Memorandum in Opposition

In its reply to the Charging Party's Memorandum in Opposition Respondent contends that the proposed settlement meets all of the required criteria of *Independent Stave Co.*, 287 NLRB 740 (1987)[15] and should be approved; and that the Charging Party's primary objections are meritless in that (1) the Proposed Settlement remedies all of the allegations contained in the complaint, as amended,[16] (2) the Charging Party is not entitled to broader remedies than those provided for in the Proposed Settlement,[17] (3) Respondent has not been involved in a history of

[15] Namely (1) whether the parties have agreed to be bound and what position the General Counsel has taken in regard to the settlement, (2) whether the settlement is reasonable in light of the allegations of the complaint against the risks inherent in litigation, (3) whether there has been any fraud, coercion or duress by any party in reaching the settlement, and (4) whether respondent has a history of violations or has breached past settlement agreements. Regarding the last criteria, Respondent argues that it does not have a history of violations and it did not breach the only prior settlement it has signed, which settlement also contains a non-admission clause.

[16] With respect to the allegation that Respondent unreasonably delayed in providing the Union with the information it requested in its May 29, 2007 letter, Respondent contends that the evidence of record shows that (a) Respondent had previously provided the Union with the vast majority of the information that it requested prior to the onset of negotiations, (b) a substantial portion of the requested information was also provided directly to business representative Michael Elick in the form of a "blue book" months before negotiations began, (c) Elick admitted that he had access to certain of the information but he did not bother to check the Charging Party's own files before requesting the information again, and (d) in view of the Charging Party's admissions, Counsel for General Counsel has moved to withdraw this allegation. Respondent points out that General Counsel, and not the Charging Party, has control over the allegations contained in the complaint, *Fineberg Packing Co.*, 349 NLRB No. 29 (2007).

[17] Respondent contends that litigation costs are only awarded in cases involving frivolous defenses and/or flagrant, aggravated, persistent and pervasive unfair labor practices; that in *Sunshine Piping, Inc.*, 351 NLRB No. 89 (2007) it is indicated that where an employer's defenses are debatable and/or are based on a credibility determination, fees and costs are not appropriate; and that in the instant proceeding Respondent's defenses are debatable and/or are based on a credibility determinations.

Respondent further contends that the Proposed Settlement should not be rejected because it does not include the dismissal of the pending decertification petition; that the decertification petition at issue was not filed by Respondent, it was filed independently by one of Respondent's employees and, therefore, it is an "RD" and not an "RM" petition; that the processing or dismissal of the petition is a function of the Regional Director and not a part of this proceeding, see NLRB Statements of Procedure, §101.18(c) and NLRB Casehandling Manual, ¶¶ 11100-11104.3; that General Counsel has not asserted that the decertification petition is tainted; that, as noted above, General Counsel controls the allegations brought in the complaint; that the Charging Party's request for a novel, extended "insulation period" for negotiations is utterly without support in the law; and that the Charging Party's argument that its bargaining expenses should be part of the remedy is meritless in that the complaint does not allege surface bargaining, the bad faith allegations in the complaint are limited to the withdrawal of recognition and unilateral changes to certain terms and conditions of employment, and again General Counsel controls the complaint.

violations of the Act,[18] (4) the dismissal of the Decertification Petition is not an issue in this case (which subject is treated supra), and (5) the Charging Party's objections to the structure of the Proposed Settlement are meritless in that it consists of two documents, namely the Formal Settlement Stipulation and the Notice which require Respondent to remedy the allegations in the complaint in a manner consistent with Board law.

On the one hand, with respect to what Respondent describes as the Charging Party's secondary objections, Respondent submits that it and the General Counsel will correct clerical errors, namely (a) "Maysville" will be changed to "Shepherdsville", (b) the allegations regarding paragraph A-2 of the December 18, 2006 letter will be included in the Proposed Settlement, and (c) the Proposed Settlement will reflect that the certified bargaining agent for the involved bargaining unit employees is ICWUC. Also, Respondent agrees that the representative of the Respondent who signs the agreement will print his name under his signature. On the other hand, the Respondent contends that certain other of the Charging Party's objections are meritless. Respondent includes in this latter category (a) the lack of a finding that the decertification petition is tainted, (b) the inclusion of a non-admission clause, and (c) the fact that the remedial Order does not direct Respondent not to violate the Act "in any manner."

F. Discussion and Conclusions

Three matters must be resolved at this juncture. First, on April 22, 2008 the Respondent filed a Motion and Memorandum in Support to Strike Portions of the Affidavit of Michael Elick which was attached to the Charging Party's Memorandum in Opposition. More specifically, Respondent contends that paragraph 4 of the affidavit should be stricken because it improperly references unauthenticated documents and paragraph 7 is undisputedly a false statement. On May 2, 2008, the Charging Party filed a pleading opposing Respondent's motion to strike. Essentially, the Charging Party argues that the unauthenticated documents are like a proffer of evidence to support the Charging Party's position that the trial should be resumed so that the Charging Party can explore the possibility of obtaining litigation and/or bargaining costs, and paragraph 7, to the extent that a portion thereof might be considered misleading, has been, in effect, corrected.

Paragraph 7 of the April 4, 2008 affidavit of Elick reads as follows:

> On March 10, 2008, the Union, following issuance of the 10(j) injunction, again requested temporary-employee information from Respondent APL, expanding upon previously-requested information. As of this date, Respondent has not provided to the Union **any** information that is already at issue in this case, or **any** expanded-upon information request, regarding temporary employees, to my knowledge. [Emphasis added]

As noted above, by notice dated April 15, 2008, the Charging Party itself corrected its

[18] Respondent points out that, as noted above, its prior settlement agreement contains a non-admission clause, and, therefore, as a matter of law that settlement cannot be used in an attempt to show that the Respondent has been involved in a history of violations of the Act, *Sheet Metal Workers Local 28 (Astoria Mechanical)*, 323 NLRB 204 (1997).

Further, Respondent contends that it has fully and completely complied with the court's 10(j) injunction and Order, and if the Charging Party believes to the contrary, it is free to pursue enforcement of that order before the United States District Court with General Counsel; and that General Counsel has initiated no such enforcement action.

Memorandum in Opposition, indicating that in the Union's previous memorandum, the impression may have been left that Representative Elick and/or the Union had not received any information from APL regarding the Union's information requests; and that while APL still has not provided all of the information requested in the Union's January 23, 2007 letter, it did provide names of purported temporary employees. In view of the Charging Party's correction, which in effect changes the word "any" in paragraph 7 of the Elick's April 4, 2007 affidavit to "all the," and inasmuch as Respondent has not provided "all the," there is no reason to grant Respondent's motion regarding paragraph 7, and it is hereby denied.

Paragraph 4 of Elick's April 4, 2008 affidavit reads as follows:

> Attached hereto as Attachment 1 are Bates-numbered pages 11-29 and 46 and 47 from the documents that Dow Corning produced in response to the Charging Party's subpoena duces tecum in this case.

It appears that the Charging Party attached these documents in the hope that they would be considered in support of the Charging Party's argument that the trial should be resumed so that it can show that Respondent engaged in bad faith and surface bargaining regarding contract negotiations, which in turn would assertedly support the Charging Party's request for extraordinary remedies. But as pointed out by Counsel for General Counsel, the complaint involved herein does not allege bad faith and surface bargaining regarding contract negotiations. What we have before us is a Memorandum in Opposition with attachments. It is a pleading; it is not part of the record in this case as would be a document received in evidence in this proceeding. That being the case, there is no need to strike paragraph 4 of Elick's April 4, 2008 affidavit and the attached documents that paragraph 4 references. Accordingly, Respondent's motion to strike paragraph 4 and its referenced documents is hereby denied.

Second, on April 23, 2008 the Charging Party filed a request for leave to file a reply brief. Such pleading was not provided for in the filing schedule described above. And the Charging Party has not shown that there is a need for a reply brief. Additionally, in its May 2, 2008 Memorandum in Opposition to Respondent's Motion to Strike parts of Elick's affidavit, the Charging Party has already taken advantage of the opportunity presented to make arguments directed at the responses of Counsel for General Counsel and Respondent to the Charging Party's Memorandum in Opposition to the proposed settlement agreement (i.e. see notes 1 and 3 of the Charging Party's Opposition to Respondent's Motion to Strike). The Charging Party's request is hereby denied.

Third, on May 5, 2008 the Charging Party filed a Notice of Additional Objection to Counsel for the General Counsel's Motion for Approval of Settlement Agreement. The Charging Party argues that while it cannot yet state for sure that any employee has been financially harmed by Respondent's unilateral PTO change, the settlement Order should require that any employee who has been harmed should be made whole; and that given that there may be other unilateral changes, the proposed settlement should have a general provision that the Respondent, at the Union's request, rescind all unilateral changes that occurred during the period of non-recognition, involving mandatory bargaining subjects, and that any unit employee harmed by any such change be made whole. This pleading was not timely filed. In it the Charging Party refers to matters which may have transpired after it filed its Memorandum in Opposition. Nonetheless, in view of the speculative nature of the pleading, the Charging Party has not demonstrated a justification for my considering the matters referred to therein. It is noted that the proposed settlement agreement does require that Respondent, upon written request of the Charging Party, rescind those unilateral changes specified in the complaint, as amended. No justification has been shown for going beyond the allegations in the complaint, as

amended. These assertions of the Charging Party are not only untimely but they have not been shown to have any merit.

In determining whether to approve a proposed settlement, the position of the General Counsel is an important consideration. *Independent Stave Company, Inc.*, 287 NLRB 740, 741 (1987).

With respect to the Charging Party's Memorandum in Opposition, contrary to its assertions, (a) § 9-420 of the Judges' Bench Book is not relevant in that it refers to a situation where the settlement offered by the respondent is opposed by both the Charging Party and the General Counsel which obviously is not the case here, (b) Section 10166.1 of the General Counsel's *NLRB Casehandling Manuel* (Part One) Settlements allows a Judge to approve a settlement when "the formal settlement itself … provide[s] for withdrawal of appropriate allegations from the complaint" and all remaining allegations are covered by the settlement, and (c) the newly-added allegations regarding the January 23, 2007 letter which broadened the information being requested about temporary employees is fully addressed and remedied in that as pointed out by General Counsel, not all of the information requested in the January 23, 2007 letter was included in the complaint, as amended.

The proposed settlement is a formal stipulation which is enforceable by a United States Court of Appeals. There does not appear to be a dispute as to whether the information covered by the May 29, 2007 Union request was provided. Rather, the complaint allegation speaks to a delay in providing this information. As pointed out by General Counsel, a formal stipulation is a stronger deterrent to any future failures or unlawful delays in providing information to which the Charging Party is entitled. I agree with Counsel for General Counsel that the withdrawal of the delay allegation to achieve a formal stipulation is a minor concession.

The Charging Party's wants to have (1) a factual finding that the RD-Petition was tainted by the fact that APL (a) failed to provide the Union with the temporary employee-related information and this was discussed by the employees who signed the petition, and (b) APL delayed in providing information in response to the Union's May 29, 2007 letter, and (2) the pending RD petition not just blocked but dismissed. Whether the involved pending RD petition should be blocked or dismissed is not an issue to be resolved in this proceeding. As correctly pointed out by General Counsel, the question of whether the involved decertification petition was tainted by Respondent's conduct is moot for the purpose of establishing an unlawful withdrawal of recognition because that allegation is being remedied by the Settlement. Also, as correctly pointed out by General Counsel, if the Charging Party wished to have a ruling regarding whether the showing of interest in the employee-filed decertification petition is tainted, it may request that the Regional Director hold a hearing on this issue in processing the RD petition, *Saint Gobain Abrasives, Inc.* 342 NLRB 434 (2004).

With respect to the Charging Party's argument about an insulation period, in *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001) the Board indicated as follows:

> It is well established that an incumbent union's representative status cannot lawfully be challenged in an atmosphere of unremedied unfair labor practices that undermine employees' support for the union. [Footnote omitted.]
>
> ….
>
> … when an employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable time for bargaining before the union's majority status can be

challenged will be no less than 6 months but no more than 1 year. 6 Whether a "reasonable period of time" is only 6 months or some longer period up to 1 year, will depend on a multifactor analysis.

_____

6 The "reasonable period" begins when the offending employer commences bargaining in good faith.

As correctly pointed out by General Counsel, the Board does not typically include this definition in the body of its order, it is inherent to the remedy and will be applied to any subsequent challenge to the Union's majority status, and the lack of a specified insulation period in the proposed Settlement is not fatal to its approval.

The Charging Party argues that it intends to seek broader or different remedies; that it has a right and a basis to seek fees and expenses for litigating these matters for six (6) days; that it may seek as part of the remedy for the alleged violations, its expenses in bargaining; that the approval of the proposed formal settlement would preclude a novel remedy like ordering that all employees be granted the highest merit-based performance wage increase on his/her anniversary date, or that all employees should be immediately granted that merit or 'cost-of-living increase as APL had proposed to Dow; and that whether the Union would be granted such remedies is not relevant as to whether the Union should be granted the right to pursue such remedies. The response of General Counsel to these arguments is summarized above. No purpose would be served in reiterating it here. Suffice it to conclude that for the reasons given by General Counsel, the Charging Party has not shown that its desire to possibly seek broader or different remedies, either alone or in conjunction with the other reasons given by the Charging Party, justifies the rejection of the proposed settlement agreement.

With respect to the Charging Party's objections based on the inclusion in the Settlement of a non-admissions clause, as noted above, Counsel for General Counsel correctly replies that inclusion of a non-admissions clause is not a valid basis for objection when the settlement otherwise effectuates the policies of the Act, *United Mine Workers of America*, 191 NLRB 209, 210 (1971). As pointed out in Section 10164.5 of the General Counsel's *NLRB Casehandling Manuel* (Part One) Settlements, "[i]f respondent consents to the entry of a court judgment, it is possible to include a nonadmission clause in the stipulation." Here, APL has consented to the entry of a United States Court of Appeals judgment. Consequently, a nonadmission clause is permissible.

Regarding the Charging Party's objections based on the inclusion in the Settlement of a standard cease and desist order and not a broad cease and desist order, as correctly pointed out by General Counsel, (a) the Charging Party has failed to substantiate its need for a broad cease and desist order as such orders are normally reserved for more egregious and widespread conduct or for a respondent who has been adjudicated as a repeat offender, and (b) while Respondent previously entered into an informal settlement agreement remedying prior alleged unfair labor practices, the prior matter was not the subject of adjudication, and any argument that Respondent somehow violated the prior informal settlement through the alleged misconduct herein is addressed by the fact that the General Counsel now seeks a formal settlement.

With respect to the Charging Party's argument about *Jefferson Chemical Co, Inc.*, 200 NLRB 992 (1972), as noted above, General Counsel takes the position that the Charging Party, now faced with a Settlement to which it objects, is attempting to preclude approval of the proposed Settlement by bootstrapping its newly-filed unfair labor practice charges to the current complaint in order to block approval of the Settlement. General Counsel contends that a cursory

review of the new charges reveals that, with the exception of the alleged unilateral pension termination, most of the allegations involve conduct about which the Charging Party knew or reasonably should have known well before the trial commenced in this matter; and that if the Charging Party is now precluded from attaining a remedy for these allegations under *Jefferson Chemical Co.*, supra, it is due to its own failure to file charges.

On February 28, 2008 the Charging Party filed three new charges against Respondent. The charges are set forth in Exhibit A, attachments 2-4 to the Charging Party's Memorandum in Opposition. The charge in Case No. 9-CA-44210, as here pertinent, alleges that "[s]ince on or about August 6, 2007 (with certain facts not known, or reasonably discoverable, by the charging party until within the 10(b) period), and continuing at various and/or all times since then, the respondent has violated the Act by the following and other acts: …." It is not clear just what "until within the 10(b) period" means in terms of the statute of limitations.

The charge in Case No. 9-CA-44211, as here pertinent, alleges that "[s]ince on or about August 28, 2008 (and/or since September 11, 2006), and at all and/or various times since then, the respondent, by and through its agent(s) and representative(s), has violated the Act by the following and other reasonably related acts: …." August 28, 2008 is a day in the future and not in the past. The last paragraph of this charge in the "Basis of the Charge" box reads "[b]y bargaining in bad faith with a strategy and intention to lead to decertification since September, 2006, a fact not known until this week."

The charge in Case No. 9-CA-44212, as here pertinent, alleges that "[s]ince on or about September 11, 2007, the respondent has violated the Act by the following and other acts: …." It is noted that - notwithstanding the fact that the charge was filed within the the applicable 6-month period - regarding the conduct the Charging Party goes on to describe in the following four numbered paragraphs, the Charging Party does not allege that these facts were not known or reasonably discoverable well before the trial in this matter began.

By the aforementioned Motion filed on May 9, 2008, Respondnet proffers three April 29, 2008 letters from Region 9 of the Board dismissing all of the Union's charges filed on February 28, 2008. The Union can appeal. The matter at hand should be resolved expeditiously since the involved Region of the Board successfully filed a 10(j) petition for an injunction involving this case. Also, it is noted that the Board has held that *Jefferson Chemical Co, Inc.*, supra, does not give rise to a blanket rule that requires consolidation into one proceeding of all charges filed against the same respondent during the pendency of a proceeding. *Maremont Corp.World Parts Division*, 249 NLRB 216 (1980). I do not believe that this argument of the Charging Party warrants rejecting the proposed settlement agreement.

The Charging Party argues that in Section V(7)(h) and in related Section VI the proposed settlement inexplicably and without explanation by the General Counsel eliminated language alleging discrimination contained in the corresponding provision of the complaint and, thereby, fails, as required, to remedy or adequately resolve all violations. General Counsel contends that contrary to the Charging Party's argument, the Settlement fully remedies the alleged discriminatory wage increases in that the parties stipulate that Respondent implemented the across-the-board wage increases and merit increase system to discourage employees from engaging in union and other concerted activities and the proposed Order requires Respondent to cease and desist from such conduct. The allegation in the complaint reads "Respondent engaged in the [involved] conduct … because the employees of Respondent formed, joined or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities." Counsel for General Counsel points out that while the language in the Settlement does not exactly mirror the language in the complaint, it proscribes the alleged

Section 8(a)(3) misconduct with the same efficacy. I agree. The Charging Party's argument does not warrant rejecting the proposed settlement agreement.

As noted above, General Counsel and Respondent both concede that certain corrections should be made in the proposed settlement. They are as follows:

1. Include paragraph A(2) of the Union's December 18, 2006 information request in the settlement proposal. (As noted above, this matter is corrected in the attachment to General Counsel's reply.)

2. Reflect that the International Chemical Workers Union Council and not UFCW Local 692C was certified by the Board as the collective-bargaining agent of the involved unit employees.

3. Delete from Section II (Jurisdiction) paragraph 2 the word "Maysville" and replace it with "Shepherdsville".

4. Print the names of those who execute the Formal Settlement Agreement under their signature and give their title.

No persuasive reasons have been advanced by the Charging Party why the proposed Formal Settlement Stipulation and Notice, as corrected, should not be approved.

Therefore, I issue the following recommended:[19]

ORDER

IT IS ORDERED that upon the Motion of General Counsel, the Proposed Settlement Agreement, which includes the Formal Settlement Stipulation and the Notice, be, and it is hereby approved with the understanding that (a) the Stipulation and Notice shall be corrected in accordance with the third preceding paragraph herein, and (b) the corrected Stipulation shall be executed.

Dated, Washington, D.C., May 16, 2008.

_____
John H. West
Administrative Law Judge

[19] Any aggrieved party may ask for leave to appeal to the Board, as set forth in Section 101.9(d)(2), Statements of Procedure and Section 102,26, Rules and Regulations.